IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-99

HARRY PARKER,

Petitioner,

v.

JAMES RANDOLPH, WILBURN LEE PICKENS, AND ISAIAH HAMILTON,

Respondents.

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Sixth Circuit has correctly interpreted the law as stated by this Court in *Bruton* v. *United States*, 391 U.S. 123 (1968); *Schneble* v. *Florida*, 405 U.S. 427 (1972); and *Harrington* v. *California*, 395 U.S. 250 (1969).

SUMMARY OF ARGUMENT

1. The admission into evidence of the statements and confessions of the codefendants which implicated

each other, but where neither codefendant took the stand to testify or was available for cross-examination by his codefendants, violated the Confrontation Clause of the Sixth Amendment to the U.S. Constitution and the rule of this Court as set forth in *Bruton* v. *United States.*

2. The admission into Evidence of Respondents' statements and confessions in violation of the *Bruton* rule was not Harmless Error.

RESPONDENTS' STATEMENT OF THE CASE

Five defendants, Robert Wood, and his brother, Joe Wood (both white); James Randolph, Wilburn Lee Pickens and Isaiah Hamilton (all black) were jointly indicted, tried and convicted by a state trial court (in Memphis, Shelby County, Tennessee) on July 25, 1972 of murder in the perpetration of a robbery[1] and each sentenced to life imprisonment in the (Tennessee) State Penitentiary.

At trial the defendant Robert Wood, who had previously given the police an exculpatory statement

[1] Tennessee Code Annotated 39-2402 provides in pertinent part as follows:

> 39-2402, *Murder in the First Degree*—An individual commits murder in the first degree if . . .
>
> (4) he commits a willful, deliberate and malicious killing or murder during the perpetration of any arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb.

prior to his indictment, in an effort to promote a "self-defense" theory, admitted that he shot the Las Vegas gambler, William Douglas, who he thought was cheating him. This shooting occurred prior to the entrance of "other parties" into the room. Robert Wood thereafter took all the money off the table (some of which belonged to him), and stuffed it in his pockets.

There were only two eyewitnesses to the shooting, Robert Wood, who fired the fatal shot, and Tommy Thomas, (the son of Titanic Thomas, another big-time Las Vegas gambler), who supposedly was a friend of both the victim and Robert Wood.

Neither of the respondents (Randolph, Pickens or Hamilton) were involved in the gambling game between Douglas and Robert Wood. They were not in the room (and had not been) when Robert Wood killed Douglas. Thomas, the only other person in the room at the time of the shooting was not a participant in the game, and was there merely as an observer.

Robert Wood had never seen nor met Randolph or Pickens prior to the shooting. He had seen Hamilton only casually, and knew him as one who worked for his brother, Joe Wood, at his used car lot. But, he had never met with either Randolph, Pickens or Hamilton prior to the shooting to discuss or "plan" anything. Further, Robert Wood did not know either respondent was coming to the scene of the poker game as part of a pre-arranged plan. Hamilton was one of those blacks, he said, who came into the room "after the

shooting" and he "assumed" that Randolph and Pickens were the other two "blacks" because he allegedly met them later, away from the scene of the shooting over at Hamilton's apartment.

The in-court testimony of Robert Wood was contrary to his initial statement to the police when he stated very positively that he could not identify the "three blacks" who came into the room and shot the victim and robbed the poker game. Both the exculpatory (out of court) statement of Robert Wood and his in-court testimony were presented to the jury.

Aside from the confessions of the respondents and the testimony of Robert Wood, there is no other evidence in the record identifying the respondents as the "three blacks" who were at the scene after the shooting and supposedly assisted Joe Wood in kicking in the door. Tommy Thomas was not able to identify them, and Joe Wood did not testify at trial, give a statement or confess.

The critical proof concerning the respondent's involvement in the crime was presented to the jury by the admission into evidence of two oral statements made by Randolph, an oral statement of Hamilton and a written statement of Pickens, through the testimonies of various police officers.

Each respondent challenged the admissibility of his own statement and those of their codefendants on the grounds that the confessions were not voluntary, secured in violation of their constitutional rights under

Miranda v. *Arizona*,[2] were inaccurate and did not contain substantially what they told the police. The pretrial motions of the respondents for severance had been denied by the trial judge.

Neither of the three black codefendants, Randolph, Pickens or Hamilton took the stand to testify at trial before the jury. Each was represented by separate retained counsel. The statements attributed to them incriminated one another. They had no opportunity to confront and cross-examine one another on the contents of the statements.

The Tennessee Court of Criminal Appeals (on June 5, 1974) reversed the convictions of the defendants and ruled that (a) *the entire record and testimony of the trial does not support the theory that the shooting was a part of a robbery attempt* and (b) the rule set forth in *Bruton* v. *United States*, 391 U.S. 123 (1968) was violated and defendants Randolph, Pickens and Hamilton were denied their Sixth Amendment right to confrontation of witnesses against them.[3]

The Supreme Court of Tennessee (on December 15, 1975) in an overly broad interpretation of the "felony-murder rule" reversed the decision of the Court of Criminal Appeals and upheld the convictions of each defendant, as determined by the jury and ruled that (a) the evidence in the record was sufficient to support the conviction for "felony-murder", (b) the interlock-

[2] 384 U.S. 436. (1966)

[3] See opinion of court in Appendix, pages 215-226

ing inculpatory confessions of Randolph, Pickens and Hamilton demonstrated the involvement of each as to crucial facts such as time, location, felonious activity and awareness of the overall plan or scheme, and (c) the *Bruton* analysis does not apply to this case, because unlike in *Bruton*, Hamilton, Randolph and Pickens, all confessed with similar, intervening versions of their own actions.[4]

In a habeas corpus proceeding, Chief Judge Bailey Brown of the United States District Court for the Western District of Tennessee, after considering the evidence presented at the evidentiary hearing on Picken's claim of denial of right to counsel, the arguments of attorneys on the *Bruton* question and consideration of the record as a whole, issued his memorandum decision (on May 2, 1977) and *ruled that (a) The admission in evidence of Pickens' confession was a constitutional error in that it violated his right to counsel as set out in Miranda*, and (b) The right of the petitioners, Randolph, Pickens and Hamilton to confrontation and cross-examination was violated under *Bruton* and he could not find that the violation of the Bruton principle was "harmless error beyond a reasonable doubt."[5]

The United States Court of Appeals for the Sixth Circuit, on appeal filed by the State of Tennessee,

[4] See opinion of court in Appendix, pages 227-246

[5] See Memorandum Opinion of the Court in Appendix, pages 321-326

affirmed in total the Chief District Court Judges' findings of fact and conclusions of law on both issues. It also rejected the "interlocking" confession theory promoted by the Second Circuit as constituting an exception to the *Bruton* rule.[6]

All four courts which have reviewed and considered the convictions and claim of respondents have failed to analyze "the whole record" in determining the facts as to respondents' involvement in the crime. They have merely recited and accepted the factual theory "most favorable" to the State.[7]

This Court granted certiorari to review only the *Bruton, Schneble* and *Harrington* issue. Respondents, therefore, submit that the refusal of this Court to review the findings of the District Court and Sixth Circuit Court of Appeals that Pickens' confession was admitted in violation of his Sixth Amendment Right to counsel as enunciated under *Miranda* constitutes a final adjudication of that issue.

[6] See *Randolph* v. *Parker*, 575 F. 2d 1178 (6th Cir. 1978); also, Appendix C, Petition for Writ of Certiorari.

[7] Respondents do not agree with the factual theory set forth by the State as will be shown in the argument herein.

ARGUMENT

I

THE ADMISSION INTO EVIDENCE OF THE STATEMENTS AND CONFESSIONS OF THE CODEFENDANTS WHICH IMPLICATED EACH OTHER, BUT WHERE NEITHER CODEFENDANT TOOK THE STAND TO TESTIFY OR WAS AVAILABLE FOR CROSS-EXAMINATION BY HIS CODEFENDANTS, VIOLATED THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT TO THE U. S. CONSTITUTION AND THE RULE OF THIS COURT AS SET FORTH IN *BRUTON* V. *UNITED STATES*.[8]

Three of the four courts which have reviewed the convictions of the three respondents have determined that their (the respondents) constitutional right to confrontation of witnesses were violated at trial and that their convictions should be overturned. Only the Supreme Court of Tennessee, in an overly broad interpretation[9] of the "felony-murder" rule[10] and adop-

[8] *Supra*, 391 U.S. 123 (1968)

[9] See *Randolph* v. *Parker*, *Supra*, 575 F. 2d, at 1181. The Tennessee Court of Criminal Appeals denied that there was a sufficient basis for a finding of "felony murder" because the murder took place *before* any alleged robbery attempt was made. See Appendix, Page 218. The Tennessee Supreme Court, relying heavily on *Wharton's Criminal Law and Procedure* and applying the *res gestae* rule found that the evidence was sufficient within the Tennessee felony-murder statute to uphold the convictions.

[10] The Felony-murder rule is "one of the most controversial doctrines in the field of criminal law." 50 ALR 3d 399.

tion of the "interlocking confession" theory[11] reached a contrary result.

In arriving at similar conclusions of law, the Tennessee Court of Criminal Appeals, the United States District Court for the Western District of Tennessee, and the United States Court of Appeals for the Sixth Circuit based their decisions on the factual theory relied upon by and most favorable to the State in setting aside the convictions. But, a closer reading and examination of the record could suggest another theory of the facts concerning the respondents' involvement which would be as consistent with innocence as the one suggested by the State of Tennessee of guilt.

If the tainted statements of the respondents were cancelled from the evidence, a logical conclusion could be reached that the two (white) brothers, Robert and Joe Wood, possibly along with Tommy Thomas, planned the robbery and murder of William Douglas and then tried to "set up" the three black men, who had no knowledge of the plan. Also, the three blacks may not have even entered the apartment where the shooting took place or even been armed on the night of the incident.

It is therefore important for this Court to fully analyze the facts and base its judgment upon its "own

[11] This theory is believed to have originated in the United States Court of Appeals for the Second Circuit, See *Catanzaro* v. *Mancusi*, 404 F. 3d 296 (1968), cert. denied, 397 U.S. 942 (1970).

reading of the record" and the "probable impact" of the evidence and confessions on the minds of the jury.

Right to Confrontation and Cross-Examination

One of the most important elements of a fair trial is that a jury consider only relevant and competent evidence in determining the facts and arriving at a verdict in a trial against a defendant.[12] The United States Constitution sets forth certain enumerated rights which are available to all persons, without regard to their innocence or guilt, to assure that a fair process and procedure is employed during the judicial process.

It is the integrity of the fact-finding process and procedure of trial which the Confrontation Clause of the Sixth Amendment seeks to remain inviolate. This provision of the Constitution guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him." This right would be meaningless without the opportunity for cross-examination.[13]

This Court has consistently held and made it clear that "the right to cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him." *Pointer* v. *Texas*, 380 U.S.

[12] See, e.g., *Blumenthal* v. *United States*, 332 U.S. 539 (1947)

[13] Denial of right of effective cross-examination is a constitutional error of the first magnitude. See e.g. *Davis* v. *Alaska*, 415 U.S. 309 (1974); *Anderson* v. *United States*, 417 U.S. 211 (1974)

400, 401 (1965); *Douglas* v. *Alabama*, 380 U.S. 415, 418 (1965) Mr. Chief Justice Burger, speaking for the majority in *Davis* v. *Alaska*, 415 U.S. 308 (1974), stated that "confrontation means more than being allowed to confront the witness physically", *Id.*, at 315; "the main and essential purpose of confrontation is *to secure for the opponent the opportunity of cross-examination*," (*Id.*, at 315-316, citing Professor Wigmore at 5 J. Wigmore, Evidence § 1395, p. 123 (3d ed. 1940).

The extent of the right to cross examine witness (as a part of the Confrontation Clause) was fully examined by Mr. Justice Brennan in delivering the Opinion of the Court in *Bruton* v. *United States, Supra.* The rules which he articulated in that decision established certain basic guidelines and standards upon which the Court should rely in deciding this case.

The Bruton Issue

The decision of the Sixth Circuit Court of Appeals in affirming the decision of the District Court, contains a well reasoned analysis of the case of *Bruton* v. *United States, Supra*, and correctly applied it to the facts of this case. The Court left little doubt that it was convinced that the constitutional rights of the respondents were violated by the admission into evidence of their confessions without the opportunity for cross-examination. In deciding the *Bruton* issue the Court correctly compared and interpreted *Harrington* v. *California*, 395 U.S. 250 (1969) and *Schneble* v.

Florida, 405 U.S. 427 (1973) and made it clear that those cases did not overrule *Bruton* but applied to certain specific facts not present in this case.

In *Bruton* the Court detailed the factual basis of the constitutional deprivation so that the application of the legal principles to a fact situation would be clear. The facts showed that at the joint trial of Evans and Bruton for armed robbery of a post office, a postal official testified that Evans orally confessed to him that Evans and Bruton committed the robbery. Otherwise, the evidence against Bruton was weak. Bruton made no admissions or confessions. Neither Bruton nor Evans took the stand and testified, and the Trial Court gave the usual limiting instruction. This Court reversed Bruton's conviction, ruling that there was a "substantial risk" that the jury looked to the incriminating extrajudicial statements in determining Bruton's guilt, and that the admission of Evans' confession in this joint trial violated Bruton's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment. This Court said that:

> "Plainly, the introduction of Evans' confession *added substantial, perhaps even critical*, weight, to the Government's case in a form not subject to cross-examination, since Evans did not take the stand . . . (emphasis added)" [*Id.*, 391 U.S. at 127-128]

The lesson of *Bruton* is that in joint trials, limiting instructions by a Judge for the jury to disregard any references and implications to a codefendant cannot

be accepted "as an adequate substitute for petitioner's constitutional right of cross-examination", where the confessor does not take the stand to testify. *Bruton, Supra* at 137.

The holding of *Bruton* was reiterated by the Court in *Roberts* v. *Russell*, 392 U.S. 293 (1968) and reaffirmed in *Harrington* v. *California*, 395 U.S. 250, 252 (1969); *California* v. *Green*, 399 U.S. 149 (1970); *Nelson* v. *O'Neil*, 402 U.S. 622, 628 (1971); and *Anderson* v. *Louisiana*, 403 U.S. 949 (1971); *Schneble* v. *Florida*; 405 U.S. 427, 430 (1972); and *Brown* v. *United States*, 411 U.S. 223, 230-231 (1973).

The state in its Petition for Writ of Certiorari and brief on the merits has liberally cited and heavily relied upon *Harrington* and *Schneble* to persuade this Court that the Bruton rule should not apply to this case. It has, however, erroneously compared the crucial facts of this case to *Harrington* and *Schneble* rather than *Bruton*. Such factors as the racial makup of the parties, and number of parties involved, though similar to those in *Harrington*, do not constitute that similarity of facts which is important on the question of stare decisis. Neither is there that other "overwhelming evidence of guilt" which existed in *Harrington* and *Schneble*.

Both *Harrington* and *Schneble* stand for the proposition that a violation of the *Bruton* rule in the course of a trial does not require reversal, if the evidence of guilt is "so overwhelming", that the prejudicial effect

of the codefendants admission is so comparatively insignificant as to clearly be "harmless error." *Harrington*, 395 U.S. at 254; *Schneble*, 405 U.S. at 1058-1960.

The specific question addressed by the Court in *Bruton* was "whether the conviction of a defendant at a joint trial should be set aside although the jury was instructed that a codefendant's confession inculpating the defendant had to be disregarded in determining his guilt or innocence." *Bruton*, 391 U.S. at 124. Mr. Justice Brennan, in speaking for the majority, declared that there is "substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining petitioner's guilt." *Id.*, at 126. *Delli Paoli* v. *United States*, 352 U.S. 232 (1957), which *Bruton* overruled, had assumed that the violation of this constitutional right which occurs when a non-testifying codefendant's confession inculpates a defendant could be remedied by an instruction to the jury to disregard the inadmissible hearsay evidence in considering the defendant's guilt.[14]

Bruton reversed the petitioner's conviction without any consideration of whether the error committed was harmless. If left open the possibility that the right to confrontation of witnesses was among those constitutional rights which, are "so basic to a fair trial that

[14] *Bruton* effectively repudiated this assumption See Mr. Justice Brennan's statement at 391 U.S. 128.

their infraction can never be treated as harmless error." *Chapman* v. *California*, 386 U.S., 18, 24 (1967).

Since this Court decided *Bruton*, it has never explicitly discussed *Bruton's* applicability to the defendant who has confessed. But, an analysis of post-*Bruton* type cases shows that the Court's holdings have been fully consistent with the position that the *Bruton* rule applies in every case in which a codefendant's confession inculpates in defendant, regardless of the nature of the other material in evidence against the defendant.

One year after *Bruton* was decided, the Court ruled that under certain factual situations a *Bruton* violation may nevertheless be "harmless beyond a reasonable doubt." *Harrington* v. *California* 395 U.S. 250 (1969).

In *Harrington*, a white man, and three blacks were jointly tried and convicted of felony murder in the state courts of California. Harrington, while not confessing outright that he had committed the offense, made certain incriminating admissions, which placed him at the scene of the crime. The three blacks confessed, and while they did not implicate Harrington by name, their confessions contained allusions to a white participant that clearly referred to Harrington. One of the blacks testified, and was cross-examined by Harrington's attorney. The other two blacks did not testify. All three of the confessions were admitted in evidence with the usual cautionary instructions.

This Court affirmed Harrington's conviction by reference to the "harmless error" rule laid down in *Chapman* v. *California, Supra,* 386 U.S. 18 (1967). The Court pointed out that apart from the confessions of the two non-testifying codefendants, the case against Harrington was a strong one including the facts that (1) counsel for Harrington had the opportunity to cross-examine the codefendent who did testify, (2) that the confessions of the codefendants who did not testify were simply cumulative, (3) several eye witnesses placed Harrington at the scene of the crime. (4) Harrington placed himself at the scene of the crime. Thus, the Court in Harrington was not able to "impute reversible weight to the two confessions [of the non-testifying co-defendants]." 395 U.S. at 254.

The *Harrington* Court flatly stated that "the rule of *Bruton* applies here." *Id.,* at 252, and proceeded to consider whether the *Bruton* error required reversal. Thus, *Bruton* was said to have been violated where the inculpating information contained in the confessions of two non-testifying codefendants simply duplicated the information contained in the appellant's own statement.

In 1971, *Anderson* v. *Louisiana* 403 U.S. 949 (1971), reversing *State* v. *Anderson,* 254 La. 1107, 229 So. 2d 329 (1969), presented a fact situation much more closely resembling the case before this court. Four codefendants appealed from convictions for aggravated rape, a capital offense in Louisiana. Each had confessed to rape of the same victim, and

named the other three defendants as participants. In a one sentence per curiam opinion, this Court reversed the convictions, citing *Bruton.* The Court identified as *Bruton* error the admission of the confessions of non-testifying codefendants which interlocked with the full confession of the defendant.

The *Anderson* defendants were tried for only one of the four alleged rapes. The three defendants who had not committed this particular rape were charged as principals as a result of their participation. The four confessions admitted into evidence, however, revealed that three additional rapes had occurred and that each of the codefendants had committed one rape and assisted in three others. The Supreme Court of Louisiana found "no substantial conflict in the confessions" and held that any error was "harmless beyond a reasonable doubt." *State* v. *Anderson,* 229 So. 2d 329, 327 (La. 1969).

In reversing *Anderson* this Court seems to have established that some non-testifying codefendant's confessions are not harmless beyond a reasonable doubt despite the presence of the defendant's interlocking confession. *Anderson* does not indicate what kinds of "interlocking confessions" cases may warrant reversal, because the Court's one sentence opinion left no clues as to which were the case's crucial aspects. Respondents here submit that the Court decided in *Anderson* that a defendant's confessions, by itself, does not constitute overwhelming evidence. This interpretation, however, would mean that *An-*

derson left uncertain the amount of additional untainted evidence against the defendant which would be necessary to make the *Bruton* error harmless. Yet the uncertainty about Anderson's reach should not be confined even to this extent, because the reversal may have been based on the comparison of the tainted with the untainted evidence, rather than—or in addition to—consideration of the quantity of untainted evidence alone. If it was, then the same amount of untainted evidence might have warranted a finding of harmless error had the tainted evidence been less directly incriminating.

Schneble v. *Florida*, 405 U.S. 427 (1972), decided shortly after *Anderson*, narrowed the possible extent of *Anderson*, but supported *Bruton's* applicability to defendants who have confessed. In describing harmless error cases as those in which the "properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the codefendant's admission is so insignificant by comparison", *Id.*, at 430, *Schneble* clearly separated the two underpinnings of *Harrington* and impliedly required reversal unless both were present.

Schneble and his codefendant, Snell, were convicted of murder. After originally claiming that Snell had committed the murder, Schneble made a full confession. Snell did not confess, but made an out-of-court statement which undermined Schneble's original claim and places Schneble in a position from which the murder could have been committed. The Court by

implication found a violation of the *Bruton* rule, thereby establishing at the very least that a defendant who has confessed may still claim a *Bruton* violation.

Mr. Justice Rehnquist found overwhelming evidence in Schneble's "minutely detailed" confession, which was "completely consistent with the objective evidence,"[15] *and in his guiding the police to the exact location of the body* in an "out-of-the-way" spot. *Id.*, at 430. Prior to his confession, Schneble made a statement blaming the murder on his codefendant, but this initial account failed to explain the rope burns on Schneble's hands. If we assume that *Anderson* found a defendant's confession alone to be less than overwhelming evidence, then the combination of *Anderson* and the first leg of *Schneble* requires reversal for *Bruton* error where there is no (or very little) untainted evidence aside from the defendant's confession, as in the instant case.

The second requirement for harmless error in *Schneble* was concluded by Mr. Justice Rehnquist to be that: "[T]he allegedly inadmissible statements of Snell at most tended to corroborate certain details of petitioner's comprehensive confession." *Id.*, at 431. Because the trial judge had let the jury decide whether Schneble's confession was voluntary in the

[15] The objective evidence consisted of blood, hair, and the murder weapon (all found in the car Snell and Schneble were driving when arrested), and a bullet (found, as Schneble said it would be, in the victim's head). *See Schneble* v. *State*, 201 So. 2d 881 (Fla. 1967); 215 So. 2d 611 (Fla. 1968).

course of determining the verdict, it was possible that the jury had found the confession involuntary and brought in a guilty verdict on the basis of the other evidence. The untainted evidence aside from Schneble's confession and its fruits however, was inconclusive. Snell's statement must have played a vital role in producing a guilty verdict if that verdict was indeed coupled with a finding that Schneble's confession was involuntary. With Schneble's confession thereby placed squarely behind the jury's guilty verdict, Mr. Justice Rehnquist decided that the " 'minds of an average jury' would not have found the State's case significantly less persuasive had the testimony as to Snell's admissions been excluded." *Id* at 432.

Both *Anderson* and *Schneble* have some meaning in considering "interlocking confessions" cases. *Anderson* involved tainted evidence which spoke directly of each defendant's guilt; in contrast, Snell's statements at most tended to corroborate *certain details* of Schneble's confession. This does not mean that under this interpretation of *Anderson*, all defendants who are directly incriminated by codefendants' confessions merit reversal. The corroborative importance of Snell's statement was lessened on the one hand by the presence of Schneble's earlier statement denying guilt. Since *Anderson* involved neither kind of additional evidence, the area within which "interlocking confessions" cases require reversal cannot be determined by looking only at the evidence provided by the codefendants in *Anderson* and *Schneble*.

Brown v. *United States*, 411 U.S. 223 (1973), decided after *Harrington*, *Anderson* and *Schneble*, involved the Court's most recent look at "interlocking confessions." In that case petitioners were convicted of transporting stolen goods and of conspiracy to transport stolen goods in interstate commerce, following admission into evidence of full and similar confessions. The Court found the *Bruton* error, which was conceded by the Solicitor General, to be harmless error beyond a reasonable doubt. In discussing the weight of the prosecutor's case, Mr. Chief Justice Burger repeated the language of *Harrington*, which *Schneble* had omitted: "[T]he independent evidence 'is so overwhelming that unless we say that no violation of *Bruton* can constitute harmless error, we must leave this ... conviction undisturbed.' " *Brown*, 411 U.S., at 231. Far more than the facts in *Harrington*, the facts in *Brown* warranted this appraisal. The untainted evidence against each petitioner, aside from his own confession, included 20 photographs of the crime in progress, the testimony of policemen who witnessed the crime, and stolen goods gathered from the truck in which he has driving at the time of arrest and from a store into which he had been seen carrying boxes.

If *Anderson* turned solely on the lack of overwhelming evidence, then it continues, after *Brown*, to require reversal where no untainted evidence aside from his own confession confronts the defendant, and to permit

reversal where the additional untainted evidence is less incriminating than in *Schneble.*

Like *Harrington* and *Schneble, Brown* also looked at the tainted evidence in comparison to the untainted evidence. Mr. Chief Justice Burger concluded that "the testimony erroneously admitted was merely cumulative of other overwhelming and largely uncontroverted evidence properly before the jury." 411 U.S. at 231. In its reference to "largely uncontroverted evidence," *Brown* returned to a concern of *Harrington* which *Schneble* overlooked. Where *Schneble* found harmless error in the admission of testimony which corroborated the defendant's confession while controverting his original statement, *Brown* found harmless error in the admission of testimony which agreed with the information provided by several more trustworthy sources. In another sense, however, *Brown* was not altogether within *Schneble's* limits, for the codefendant's confession in *Brown,* unlike his counterpart's statement in *Schneble,* by itself fully incriminated the defendant. Nonetheless, it is easier to say of *Schneble* that without the statement by the codefendant—to the pertinent sequence of events, the case would have been "significantly less persuasive."

If *Anderson* rested on a comparison of tainted and untainted evidence, therefore, it continues to require reversal of some "interlocking confessions" cases after *Brown.* The tainted evidence in *Anderson,* like that in *Brown,* fully incriminated each of the defendants. But far from dwarfing the tainted evidence, as in

Brown, the untainted evidence against each *Anderson* defendant consisted of only one confession, corroborated by three tainted confessions.

Therefore the logical conclusion to be drawn from *Harrington, Anderson, Schneble* and *Brown* is that it is not always harmless error when a nontestifying codefendant's confession incriminates a defendant who has made an "interlocking confession." Neither of those cases destroyed the vigor and vitality of *Bruton,* but reinforced it.

In the instant case the confessions and statements of Randolph, Pickens and Hamilton were very "vital to the government's case." At no time has the State contended that either respondent fired the fatal shot, robbed the game or was arrested at the scene with any weapons or money from the game. It's basic contention is that respondents were part of "a plan to rob" the game, with Robert Wood and his brother, Joe. If no "planning" link had been established between Robert Wood and the respondents, obviously they could not have been found guilty of murder in the perpetration of a robbery.

By considering the two conflicting statements of Robert Wood in the light "most favorable" to the state and *all* the other evidence in the record, aside from respondents' statements and confessions, there is *no* proof whatsoever, that respondents ever met (among themselves, nevertheless with any body else) to plan the robbery.

It is *only in the confessions and statements* of respondents is there any mention or reference to a meeting (with Joe Wood) to plan the robbery and their presence at the scene of the crime, both crucial elements of the offense.

Each respondent's statement makes reference to the involvement of the other in the plan and/or at the scene of the crime and afterwards. It is obvious, from a reading of the statements, that the omission of the specific names of the other parties, was meaningless. Once the prosecutor in the joint trial gave his opening statement to the jury of his intention to prove the joint participation of the co-defendants on trial, it made no difference, whatsoever, as the state would lead this Court to believe, that the substitution of such words as "a friend", "this friend", "we", "they", "he", "the party", "other party", "a guy's house", "him", "one guy", "two others", for the specific names would remove from the jury's mind and consideration the references of the confessor to the other defendants on trial.[16]

Therefore the District Court and Sixth Circuit Court of Appeals were correct in holding that the

[16] In *Harrington* the Court stated that the circumstances of the case and the details of the confession may make it "as clear as pointing and shouting that the person referred to was" the co-defendant. 395 U.S. at 253. See also, *United States* v. *DiGilio*, 538 F. 2d 972, 983 (3rd Cir. (1976) where petitioner's name was substituted in the co-defendant's statement with the word "blank."

Bruton *error* existed in this case when the statements and confessions of the respondents were admitted into evidence and neither one of them took the stand to testify or was available for cross-examination by his co-defendants.

II

THE ADMISSION INTO EVIDENCE OF RESPONDENTS' STATEMENTS AND CONFESSIONS IN VIOLATION OF THE BRUTON RULE WAS NOT HARMLESS ERROR.

In the cases decided since *Bruton*, this Court has stated very clearly that *Bruton* errors can, nevertheless, be harmless under appropriate circumstances. *Harrington* v. *California*, *supra*, *Schneble* v. *Florida*, *supra* and *Brown* v. *United States*, *supra*. In determining the "appropriate circumstances", a careful analysis of the evidence presented to the jury in each case must be made.

In *Chapman* v. *California*, *supra*, this court refused to allow a state to apply its harmless error standard and said that the admission of evidence which violates a federal constitutional right can be ruled harmless error only *under the federal standard for harmless error* that "the court must be able to declare that it was harmless beyond a reasonable doubt." *Id.*, at 24. 386 U.S. at 24.

The *Chapman* Court adhered to its holding in *Fahy* v. *Connecticut*, 375 U.S. 85 (1964) which stated that:

> "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction. To decide this question, it is necessary to review the facts of the case and the evidence adduced at trial",

[*Id.*, at 86-87].

Harrington v. *California*, *supra*, specifically affirmed *Chapman*. Mr. Justice Douglas, in his majority opinion said that:

> "We do not depart from *Chapman*; nor do we dilute it by reference. We reaffirm it ... *The case against Harrington was not woven from circumstantial evidence. It is so overwhelming* that unless we say that no violation of Bruton can constutite harmless error, we must leave the state conviction undisturbed."

[*Id.*, at 254] (emphasis added).

Mr. Justice Brennan, the author of *Bruton*, expressed reservations about the Court's holdings in *Harrington* concerning the "overwhelming" untainted evidence to support the conviction. He stated in his dissent that:

> "The focus of appellate inquiry should be on the character and quality of the tainted evidence as it relates to the untainted evidence and not just on the amount of untainted evidence."

Id., 395 U.S. at 256.

There are contradictory factual conclusions that can be reached in this case by a consideration of all

the evidence in the record, including the confessions of respondents. The Court may make its independent examination of the facts, findings, and the record to determine whether the fundamental "constitutional-criteria established by this Court have been respected." *Ker* v. *California*, 374 U.S. 23 (1963). The result of such examination may disclose a gross miscarriage of justice in the conviction of these respondents of "murder in the perpetration of a robbery", where they neither murdered the victim nor robbed the poker game.

The evidence admitted at the trial for the jury's consideration included the following: (a) the testimonies of five (presumably imparial) witnesses who testified as to facts they observed outside the apartment just before and after the shooting, (b) the redacted statement of Robert Wood taken before he was charged with the shooting, (c) the testimony of Tommy Thomas, an eyewitness to the shooting, (d) the in-court testimony of Robert Wood, (e) the oral statement of Isaiah Hamilton (introduced through the testimony of a police officer), (f) two oral statements of James Randolph (introduced through the testimony of two police officers), and (g) the redacted statement of Wilburn Lee Pickens (introduced through the testimony of a police officer). The other statements purportedly made by Hamilton and Pickens should not be considered on the question of harmless error because they were not presented to the jury.

Of the five witnesses who observed events outside the apartment, a Ms. Waterbury and a Ms. Rudkins testified to seeing "three colored men" leaving the apartment *after* the crime was committed. A Mr. Knight testified to seeing "three blacks" at the door of the apartment attempting to break it down. A Mrs. Knight and a Mr. James testified to seeing "a white man and three blacks" at the apartment at the time the robbery was committed.[17] Neither witness, however, could identify either of the respondents as those blacks (colored men) at the scene. Nor did either of those witnesses say that they saw the unidentified blacks with any pistols or shotguns in their hands outside the apartment door.

In his first (redacted) statement to the police,[18] Robert Wood, said he didn't know who picked up the money off the table after the "three guys" kicked in the door. (A. 84) The victim had a .38 caliber revolver in his pocket that he reached for when the door was kicked in. (A. 85) No other person was with them (the three) and came into the room (A. 86). When asked if he could identify either of the three suspects if he saw them again, he said "I doubt it." (A. 90) Also, he couldn't recognize any of the suspects in the police photos. (A. 91) He could not specifically describe the kind of clothing any of the suspects had on because things happened so fast. (A. 89-93)

[17] See Footnote 23 of Brief For Petitioner.

[18] In the form it was presented to the jury is contained at pages 61-106 of the Appendix.

In his testimony at trial,[19] Robert Wood said that the victim was armed with a .38 caliber pistol and an automatic shotgun. (A. 114) He shot the Las Vegas gambler (with a .22 caliber derringer) after the victim went for the gun in "his waist band." (A. 116) A few seconds thereafter, "three colored guys" came in, and he thought one of them "fired a shot into the wall." (A. 116-117) He said Hamilton was one of the blacks that came into the room. He knew him as one who had worked for his brother for six (6) years. But, he did not know either Randolph or Pickens and had never met either of them. (A. 117) Robert Wood said *he* picked up most of the money off the table and "stuck it in my pocket." (A. 117) He didn't know what happened to the rest of the money (if any was in fact left). He carried the .22 Derringer from the apartment. (A. 118) Robert Wood did not say what, if anything, the three blacks carried from the apartment. They left the apartment before he, Joe Wood and Tommy Thomas. (A. 118) When asked on cross-examination about the "robbery plan", Robert Wood said his brother, Joe, told him "he would bring someone with him" to help get his money back *if he caught the man cheating* and he did not voluntarily give the money back after demand. Robert said he "didn't know exactly who or how many" would be coming with Joe, if anybody. (A. 127-129 See also A. 147-148) He further said, he didn't know if these people who were supposed to help, knew where the

[19] Appendix, pages 106-150.

place (apartment) was. He "assumed" Joe told them. Neither did he know whether they would be "armed or unarmed." (A. 148) He didn't discuss it (with Joe). (A. 130) He "assumed" that Pickens and Randolph were among the three blacks who entered the apartment after the shooting because he said he met "them" later at Hamilton's apartment. (A. 136) When asked directly whether any of the male blacks who entered the apartment had a .38 pistol, Robert Wood said, "*I don't know what kind of weapons they had if they had weapons*" ... (A. 137) Besides the .38 revolver and shotgun (possessed by the victim) and the .22 Derringer (which he carried from the apartment) Robert Wood said there was also another gun in the (his) car when he "ran to the car" in the parking lot. (A. 137) The car carrying the three blacks had left the scene earlier, but Joe spotted it on the interstate and said "follow them." (A. 139) Robert Wood said he knew the weapons in the apartment were taken "by someone" and hid in Hamilton's apartment. (A. 140-143) He couldn't say "for sure" whether his brother was the one who asked Hamilton "to hide those guns." (A. 143) He claimed that all five of them went into Hamilton's apartment but said "*I went in there for a second and I left* and went back to the car and Joe was in there a little longer than I was." (A. 143) When asked directly whether the three blacks (including Hamilton who he said he knew) were in the apartment with him and his brother, he said "I think so, I'm not sure." (A. 144.)

All of the above paragraph constitutes the gist of Robert Wood's testimony before the jury. No where, does he state where and when the respondents met with Joe Wood or anybody else to "plan the robbery." His identification of petitioners as being at the scene of the crime is based upon his assumptions after having met them "for a second" at Hamilton's house and was contrary to his first statement to the Police. He does not claim to have given respondents any money for their "participation in the crime", though he apparently had taken all of it from the poker table. His testimony does not disclose what weapons, if any, the blacks had in their hands when they entered the room. Also, Robert admitted that he, Joe Wood, and *Tommy Thomas* met after the incident over Thomas' girl friend's house to agree on a plan to place the murder and robbery on three unidentified blacks. (A. 120).

The testimony of Tommy Thomas, is basicly consistent with the in-court testimony of Robert Wood. Despite Thomas' involvement and presence at the games and knowledge of the cheating and other details, he was not charged with anything relating to this offense. He even claimed that he didn't know whether Joe Wood entered the apartment with "the three male Negroes," although the testimony from the impartial witnesses seem to show that Joe was the one who was first at the door and did the kicking. Nevertheless, Thomas, the only other eyewitness to the murder and robbery could not identify the re-

spondents as those "three Negroes" who came into the apartment after the shooting. (A. 211).

The only other remaining evidence considered by the jury was the "tainted" confessions of the respondents. The trial judge admitted these statements into evidence, despite "some rather vivid coercion complaints"[20] and allegations of denial of constitutional rights.

On the issue of voluntariness of the confessions, Hamilton testified outside the presence of the jury,[21] that his confession was coerced and that he did not make the statements attributed to him. He also stated that he only had a third grade education and could not read or write. It may have been for this reason that the State elected not to introduce Hamilton's written statement.

Randolph testified, outside the presence of the jury,[22] that he was physically abused during his interrogation and punched in the stomach by the interrogating officers. He also testified that he was not advised of his rights until after he had made the statements.

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[20] See *Randolph* v. *Parker*, supra, where Circuit Judge Edwards observed that "It should be noted that at the original trial, motions to suppress the Randolph and Pickens statements were made on grounds of physical abuse and threats, but were denied by the state court trial judge after some rather vivid coercion complaints. 575 F. 2d at 1180.

[21] Hamilton testified two times, beginning at pages 473 and 515 of the trial record.

[22] Randolph's testimony begins on page 596 of the trial record.

Pickens also testified, outside the presence of the jury[23] that he was subjected to considerable abuse, threats and undue pressure from the police officers and that the statement he signed was not his own. He also testified that he was not allowed to contact his lawyer, before making a statement. Both the District Court and the Sixth Circuit have agreed with Pickens on that issue. The record also shows that Pickens was nearsighted and that his eyeglasses were taken from him at the police station and he could not read the statement he signed.[24] But, it is Picken's statement which is the "most damaging" of the three on the material issues.

The Trial Judge instructed the jury that a statement must be voluntary to be considered as competent evidence.[25] It also instructed the jury after the reading of each confession not to consider the statements as they relate to any other defendent.[26] A careful reading of the record however, makes it difficult to determine what evidence the jury believed or even considered in convicting Randolph, Pickens and Hamilton of felony-murder besides their confessions.

The only statement of any pre-plans to rob the poker game is contained in the three similar statements of Randolph, Pickens and Hamilton.

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[23] Pickens testimony begins on page 689 of the trial record.

[24] See pages 704-706, Trial Record.

[25] See page 942, Trial Record.

[26] See pages 777-778, Trial Record.

A close examination of the confessions themselves do not disclose that Randolph and Pickens had "planned" very long before going with Hamilton to the scene of the poker game that night. The confessions, though similar in some respects, are inconsistent, illogical and secured under questionable circumstances. They do not interlock with the necessary quality to constitute, by themselves, that "overwhelming evidence" talked about in *Harrington*, *Schneble* and *Brown* to render a *Bruton* violation harmless.

Hamilton's oral statement (A. 160-162) read to the jury said that a man he worked for "told him to find two other parties to meet him at the apartments." (A. 161). It also said that they heard a shot from inside the apartment, the door was kicked open and they saw the victim on the floor and "another party in there waving a .22 stack barrel gun . . . at this time they turned and ran back to the car and returned to [his] apartment on Haynes at which time they were met by two other parties, who gave them some guns at which time [he] hid them in his attic." (A. 161-162).

Nowhere in Hamilton's statement read to the jury is there any mention of a plan "to rob" the poker game. Nor does the statement show that he or any of the "two other parties", had any kind of weapons at the scene or received any money thereafterwards for their involvement. The statement doesn't even say that they entered the apartment. Therefore, assuming

arguendo, that Hamilton's statement could be considered against him in a separate trial, there would not have been that degree of evidence "beyond a reasonable doubt" to have convicted him of "murder in the perpetration of a robbery."

In Randolph's first statement (A. 162) read to the jury he said that he was at his home (about an hour and a half before the shooting) and "was preparing to go to the wrestling matches" with his wife, when a "friend in a GTO convertible" came to his house and insisted that he go with him and "two more of his friends out there in the car." (A. 162).

There is nothing in the statement to indicate that he knew of a plan to rob anything, or where the friends were supposed to be going or that any of them had weapons, or entered the apartment after the shooting or that he received anything for his alleged participation in the robbery.

The second statement of Randolph (A. 163-164) however omits reference to the pre-plans of he and his wife to go to the wrestling matches and gives some detail of his having been apprised of the "robbery" plan by "the party in the GTO convertible." It further states that at the scene after the door was kicked in "another party" fired a shot into the wall to scare the other party that was waving the pistol. They ran from the apartment, went to "another party's" apartment, "were shortly joined by *two other parties* who gave *them* $50.00 a piece and some guns

which were hid in *another party's* attic. Randolph supposedly had a .38 revolver, *another party* had a .38 and *another party* had a sawed-off shotgun. (A. 163-164).

Only in the second oral statement of Randolph is there any mention of the three respondents receiving any money ($50.00) from the "two other parties" who joined them. Robert Wood never testified or gave a statement that he gave the three blacks any thing after the shooting. Only in Randolph's second statement does he identify he and his two accomplices as having any particular weapons, to wit, two .38 revolvers and a sawed-off shotgun. The two "other parties" clearly refers to Hamilton and Pickens.

In Pickens' written statement, (A. 170-176) which was secured in violation of his right to counsel under *Miranda* and signed without his being able to read the contents thereof, stated that he went over "a guy's house to see his sister-in-law about an hour before the shooting when "another guy" came by. (A. 171). They left there going to "some girl's house over on Lauderdale and Mallory (Streets)." They were there about half an hour drinking beer. They left there and went to "Mary's Place" on Boile Street for "a picnic"; they were there about twenty-five (25) minutes. Then they left and went to Airways and Winchester, where they met this fellow who they were to follow to the Krystal Restaurant. The other fellow stopped at the drive-in grocery store next to the Krystal, got some beer and they went back to the

parking lot near the crime scene. After two of them in the car were beckoned by "the guy" to come to the apartment where the gambling was going on, "*we* all jumped out of the car. *One guy* had a sawed-off shotgun. *One* had a pistol. I think it was a .22. I had a .38 revolver." (A. 172). The statement goes on to detail the involvement of all three of the parties (respondents) in the crime, consistent with the State's theory, including the plan to rob the poker game (A. 174) and his having been told of the plan "about a week and a half before the incident and two of them having been taken to the scene beforehand. (A. 174-175).

Clearly, Pickens confession, which is "very tainted", is the most damaging statement of the four heard by the jury. It details the respondents' alleged participation in the crime. It is similar in many respects to Randolph's second statement and contrary to most of the things in Hamilton's oral statement and Randolph's first statement read to the jury. The references in Pickens' statement to "we", "two of you all", "one guy", "the other three guys", "the two others", "they", and "us" obviously refer to Hamilton and Randolph and in a few instances to Joe Wood. The conclusions are clear, especially after the jury has been apprised of the government's theory of the case.

It does not "appear" in the confessions of Randolph or Pickens that they had "planned" or made preparations in advance to go to the scene of the crime before the "other party" arrived in the GTO. Also, it

is illogical that they would have gone to a girl's house to drink beer and later to a picnic "over Mary's" with .38 caliber pistols on them, if they had previously planned to rob the poker game an hour later. Neither statement indicates where or when they picked up the pistols and sawed-off shotgun. Pickens statement says he never went to Hamilton's apartment after the shooting, and therfore did not receive the $50.00 referred to in Randolph's statement.

Therefore, the confessions themselves do not contain that logical and credible information which the State contends "corroborates" the other evidence. It is thus reasonsable to conclude that Randolph, Pickens and Hamilton were victims of circumstances, innuendo, and involuntary statements containing untrue information. The jury after having heard all the evidence and testimony probably could not distinquish one confession from the other. They could well have rejected all of Robert Wood's testimony in Court in light of his prior inconsistent statement and efforts to justify his theory of self-defense.

The "interlocking confession" theory which has been adopted by the Second Circuit, [27] with reservations,[28] as an exception to *Bruton*, is not founded

[27] *United States ex rel. Cantazaro* v. *Mancusi*, 404 F.2d 296 (2nd Cir. 1968), cert. denied, 397 U.S. 942 (1970).

[28] In *United States ex rel. Ortiz* v. *Fritz*, 476 F. 2d 37, 38-40 (2d Cir.) cert. denied, 414 U.S. 1075 (1973) a panel of the Second Circuit questioned the "interlocking" confession doctrine but felt bound to follow it by citing *Cantazaro*.

upon any decision of this Court. But is a misinterpretation of the Court's holding in *Bruton*.

The Sixth Circuit's decision in this case addresses the issue of interlocking confessions only in response to the State's contentions and reference to the opinion of the Supreme Court of Tennessee, but does not say that these confessions interlock.

The interlocking confession theory has been the result of varying efforts to determine the question of "harmless error" as applied to individual factual situations.[29]

This theory in effect states that a Court may admit into evidence hearsay testimony depending upon the contents of said statement and how it compares favorably with other (normally) admissible evicdence. Such a position disregards the basic principles of the Sixth Amendment to the United States Constitution and *Bruton*. Hearsay is Hearsay. It cannot be cured because it is the same or similar to another statement. To reach this conclusion would be to say that because the confessions are "similar" in content and corroborate each other that they are admissible, even though neither co-defendant was present when the other gave his statement nor was able to cross-examine each other in Court.

The summary of the evidence and testimony against these three respondents was not "so over-

[29] See Footnote 3 of *Randolph* v. *Parker*, 575 F. 2d at 1184.

whelming" as to render the improper admission into evidence of their statemensts harmless beyond a reasonable doubt.

CONCLUSION

The respondents, James Randolph, Wilburn Lee Pickedns and Isaiah Hamilton respectfully submit that clear *Bruton* violations occurred when their statements were admitted into evidence without the opportunity for cross-examination of each other, and that this error was not harmless beyond a reasonable doubt under *Chapman* v. *California.* For all of the above mentioned reasons this Court should affirm in total the decisions of the District Court and Sixth Circuit Court of Appeals and fortify those precious rights to confrontation and cross-examination outlined in *Bruton* and the Sixth Amendment to the Constitution of the United States.

Respectfully submitted,

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